

August 26, 2016

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

**Re:** PS Docket Nos. 15-80, 11-82; ET Docket No. 04-35

Dear Ms. Dortch:

On August 23, 2016, Harold Feld, John Gasparini and Dallas Harris of Public Knowledge (collectively “PK”) met with Brenda Villanueva, Peter Shroyer, Joseph Schlingbaum, Steven McKinnon and Jeff Goldfarb of the Public Safety and Homeland Security Bureau (collectively “PSHSB”), with regard to the above captioned proceedings.

**Data Collected On Outages Should Be Publicly Available, At Least With Regard to the Fact of Outage, Duration of Outage and Scope of Outage.**

PK reiterated its argument, made since this proceeding opened in 2011, that mandatory reporting data should be made public rather than kept confidential. Honesty and compliance is guaranteed by FCC regulations and federal law. Unlike voluntary disclosures, there is no need to encourage providers to make disclosures with the promise of anonymity. To the extent the mandatory report contains trade secrets or other proprietary information, that information can properly remain confidential. But the *fact* of an outage, and the facts with regard to the length of outages, the number of outages, and the population and services impacted are public knowledge – at least to the members of the public in the impacted area. A publicly available fact, by its very nature, cannot enjoy any privilege as a trade secret or proprietary information.

Additionally, making the fact of an outage, its duration and its scope publicly available has many important public interest purposes. First and foremost, it enables news reporters, policy advocates and others engaged in public debate over the reliability of our critical communications infrastructure access to a reliable source of information that answer the most fundamental questions about communications reliability and resiliency. This function by the Commission is even more critical in light of the increasing number of states that have preempted any form of regulation – including mandatory reporting requirements – on providers of IP-based services.

Additionally, availability of reliability information will reassure the public with regard to reliable networks and encourage less reliable networks invest in reliability as networks advertise based on their comparative reliability. This was precisely the dynamic that followed the creation of the FCC speed test and issuance of regular reports to the public. There, as here, providers initially resisted disclosure of the data for fear it would embarrass them. After the fact, the providers embraced the report because it demonstrated that the majority of them were providing advertised speeds, and provided them with a reliable way to advertise that fact to the public.

## **The Proposed Rules on Mandatory Broadband Reporting Are Critical To The Core Functions of The Commission To Promote National Security, Public Safety Via Communications.**

Maintaining an accurate picture of the reliability and resiliency of broadband critical infrastructure is essential for national security planning and public safety planning. To engage in effective emergency and response planning, federal, state and local Homeland Security and First Responders must know the reliability of the networks – especially when networks such as the mobile networks are overwhelmed. Increasingly, these agencies and First Responder teams include broadband as part of their communications with the public and use of commercially available infrastructure for emergency communication purposes.

If a broadband network is subject to repeated outages and is unreliable, emergency preparedness authorities need to understand that and take it into account. If a network is stable and reliable, that also becomes part of emergency planning. This includes planning for potentially long-term related outages such as following natural disasters. The overall reliability of the communications network depends on several factors, including the redundancy of potentially having multiple networks in a region so that if one goes down, the other is available. Knowing the number of available communications networks through which authorized emergency responders can communicate vital messages is critical to emergency planning. Authorities must also be able to know in realtime the status of local networks to direct the public to working networks – and reassure the public when networks will return to operation.

PK stresses this is not about imposing reliability obligations or others imposing regulations beyond the reporting requirements. It is the data that these reporting requirements provide that are the critical element for emergency preparedness. For purposes of emergency preparedness, authorities must have an accurate picture of the communications infrastructure so that they can plan ahead of time. As demonstrated by the value of organizations such as Telecoms Sans Frontiers (aka Telecom Without Borders)<sup>1</sup>, communications – including broadband communications – is as necessary to emergency response as medical supplies and potable water. Those charged with emergency preparedness must therefore have an accurate picture of the communications infrastructure for planning purposes, to avoid surprise and potentially life-threatening delays when an emergency occurs.

## **The Proposed Rules on Mandatory Broadband Reporting Are Also Critical To Effectuating The National Policy of Ensuring Widespread Adoption of Broadband For Purposes of Economic Growth, Civic Engagement, Access to Government Services and Education.**

Similarly, as the Commission and Congress have repeated on multiple occasions, reliable broadband has become as necessary as reliable electric power for economic development and

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<sup>1</sup> See, e.g., Manila Times, “Gov’t Working to Mitigate Storm Impact,” (October 15, 2015) (describing cooperation between Philippine government and Telecoms Sans Frontiers and local phone provider following typhoon). Available at: <http://www.manilatimes.net/govt-working-to-mitigate-storm-impact/224688/> ; See also USA Today, “At least 708 killed in Chile Earthquake,” (February 28, 2010). Available at: [http://usatoday30.usatoday.com/news/world/2010-02-27-chile-earthquake\\_N.htm](http://usatoday30.usatoday.com/news/world/2010-02-27-chile-earthquake_N.htm)

other positive public purposes. Whether it is children doing their homework online, businesses using online inventory and ordering systems, or even farmers engaged in modern “precision farming,” broadband must not only be available – it must be reliable. The Commission’s existing annual broadband report and the available broadband map cannot capture whether the broadband offered in a geographic area is sufficiently reliable for these purposes.

Again, although the collection of this information will undoubtedly inform policy makers at the local, state and federal level, it does not, of itself, impose new obligations (other than the reporting requirements).

### **Legal Authority**

As an initial matter, the authority on which the Commission relied in its 2004 Order and earlier orders remains applicable here. The provision of broadband is a Title II service, and none of the provisions on which the Commission previously relied (e.g., Section 1, Section 4(i), Sections 201-02, Section 403) are any less applicable to broadband. In addition, the Commission’s obligation to promote access to “advanced telecommunications services,” 47 USC 1302(a), clearly applies. As made clear by the Broadband Improvement Act of 2008, Congress intends the Commission to use its authority (particularly its authority to collect information), to promote deployment and adoption of broadband because of the broad benefits conveyed to society at large through national connectivity. These benefits cannot be achieved if broadband is so unreliable that the public cannot entrust to it critical public safety applications, educational uses, or business activity.

In addition, 47 U.S.C. §162 authorizes the Commission to do whatever research it deems necessary “in connection with any matter related to the Commission’s authority.” As noted above, the question of reliability is clearly tied to the Commission’s responsibility under 47 U.S.C. §1302(a), as well as its responsibilities to maintain a working emergency communications system. Additionally, however, the reliability reports will assist the Commission in the execution of its responsibility to promote universal service under Section 254. The reliability reports will allow the Commission to determine whether, as required by law, whether rural areas and low income Americans have meaningful access to advanced service in accordance with 254(b)(2), and whether the provision of these services in rural areas is comparable with urban areas, or if provision of these services is comparable between low income communities and higher income communities in accordance with Section 254(b)(3). It will assist the Commission in administering the Connect America Fund by allowing the Commission to determine whether service currently offered in an eligible area is so unreliable as to render that area effectively unserved. Finally, reliability reporting will assist the Commission into administration of Section 201(b), by allowing it to determine whether consumers are, in fact, receiving the service for which they pay or whether the service provided makes the service so unreliable that the failure to properly provision is an unjust and unreasonable practice.<sup>2</sup>

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<sup>2</sup> See *USTelecom v. FCC*, Docket No. 15-1063 (released June 14, 2016) slip op. at 51-54 (upholding Commission regulation of broadband interconnection agreements under Section 201(b) as necessary to prevent broadband providers from circumventing requirement to offer consumers neutral BIAS service).

## **The Tech Transition Established the Policy of the United States to Phase Out Separate TDM-based Networks and Emphasized the Importance of Maintaining Reliability of Service to Consumers.**

Additionally, the Commission's recent actions with regard to the transition of our national communications network to an all-digital platform using IP-based systems, generally referred to as the "Tech Transition," underscore the need to establish reporting rules for IP-services such as broadband access. It is now the official policy of the United States, through the actions of the Federal Communications Commission, to gradually retire separate TDM-based networks. Similarly, as part of the Commission's overall policy to encourage spectrum efficiency and deployment of advanced wireless services, the Commission is actively encouraging the retirement of 2G and 3G spectrum over time to replace these standards with LTE, another IP-based system.

As the nation becomes increasingly less reliant on TDM networks, CDMA, GSM, and other non-IP-based networks the application of reporting rules primarily to non-IP based networks becomes increasingly less relevant to ascertaining an accurate picture of our national communications infrastructure. Consistent with the fundamental values identified by the Commission as guiding the transition, the FCC must also transition to blackout reporting obligations to apply to IP-based services. As broadband is increasingly incorporated into all aspects of communications, and broadband networks deliver communications services in addition to BIAS, understanding the reliability of broadband networks on the impact of this reliability on other communications covered by Part 4 is critical to the FCC's mission and consistent with the fundamental values of the transition.

## **The Proposed Rules Do Not Impose A Significant Reporting Burden On ISPs That Already Provide Reporting for Voice and/or VOIP outages.**

The ongoing Tech Transition underscores the increasing skepticism the Commission should show with regard to the cost arguments made by carriers. As BIAS and other, covered, telecommunications services share the same physical networks, and rely on each other for delivery, the less expensive it becomes to report on BIAS outages. Indeed, at some point, and this may already be the case for some carriers, it costs more money to actively screen out BIAS-related elements from reports automatically generated by carriers than it costs to monitor and report on BIAS-related elements.

As the Commission and others have noted, BIAS providers (with some exceptions discussed below) are already subject to Part 4 reporting obligations for voice services and, under the 2004 Order, certain business services. The actual work of setting up an appropriate interface with the Part 4 reporting system, training personnel, and filing reports in the event of outages, is already part of their cost structure. The relevant question is therefore what is the new *incremental* cost of providing the reporting requirements, not what would be the cost of setting up a reporting system from scratch.

Based on the fact of the Tech Transition, as well as the knowledge that carriers monitor their reliability for their own purposes, the Commission can reasonably assume that the additional cost of Part 4 reporting is comparatively small, and certainly outweighed by the considerable public

benefits. The burden should therefore be on carriers to provide substantial evidence to the Commission to justify their claims that the costs are so high as to outweigh the benefits.

**The Commission Should Balance Concern for WISPs, New Entrants, and Other Small Providers For Whom Costs May Prove Significant With the Need to Have an Accurate Picture Of Broadband Reliability For All Americans.**

The exception to the above applies to BIAS providers that are not otherwise subject to the Part 4 reporting requirements, especially if these providers are comparatively small. WISPs, for example, have typically offered only BIAS service and have never been subject to Part 4. They would therefore need to build the necessary reporting infrastructure and train personnel from the ground up. Unlike the typical case described above, it is easy to see how imposing these new costs could have a significant impact on the operating costs these carriers must bear, resulting in either a significant price increase to customers or even with providers choosing to exit the market entirely.

Additionally, these broadband only providers that have never been subject to Part 4 are likely to serve communities unserved by larger carriers, or compete with large carriers primarily on the basis of price. Imposing a sudden cost increase would therefore have significant consequences on the provision of broadband services to rural areas, to promote availability of affordable broadband, and to promote competition in the provision of broadband services.

At the same time, these concerns must be balanced with the need to have an accurate picture of our national communications infrastructure. Rural customers and low income customers deserve to have reliable broadband service in accordance with Section 254(b)(3). Authorities responsible for emergency preparedness need to know the available communications assets in the geographic region. While any one of these providers may be small, both in term of size and in marketshare, an understanding of their reliability is still important for emergency preparedness.

PK therefore recommends that, if the Commission adopts the proposed rules, it should establish a reasonable exemption in the short term for small providers not already subject to the Part 4 reporting requirements because they offer a service already covered by the rules. (Again, small providers who already have experience with Part 4 and the necessary infrastructure for reports are likely to have much less significant incremental costs). Additionally, the Commission should work with trade associations and the broader set of stakeholders to find ways to reduce the expense of reporting requirements to something manageable.

For example, is there authority under Section 254, in light of the requirements of Section 254(b)(3), to provide one-time grants to create the necessary infrastructure and train personnel? Are there ways that small providers can use 3<sup>rd</sup> parties, such as upstream backhaul providers, to monitor the networks and provide the necessary reports? Can small providers pool resources to hire third parties at a reduced price? Are states or local governments willing to assist in funding the necessary reporting and infrastructure training? Can reporting requirements be altered in a way to lower cost but provide the most critical information?

These are all possibilities that will take time to explore, and no one solution may be adequate for all such providers. In addition, such an approach would require cooperation from trade associations such as WISPA, INCOMPAS and CCA, as well as direct input from small carriers. It will be impossible for the Commission to explore such possibilities on its own if small carriers and their trade associations insist on unrelenting opposition to application of any Part 4 rules, and only a total, permanent exemption will suffice. Nevertheless, to the extent the Commission staff can engage in outreach to this class of BIAS carriers even at this early stage, it should make every effort to do so.

In accordance with Section 1.1206(b) of the Commission's rules, this letter is being filed with your office. If you have any further questions, please contact me at (202) 861-0020.

Respectfully submitted,

/s/ Harold Feld

Harold Feld

Senior V.P.

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